INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statement	2
Argument	8
Conclusion	11

CITATIONS

CASES:	
Collins v. *United States*, 157 F. 2d 409	9
Hurlow v. *United States*, 301 F. 2d 361, certiorari denied, 371 U.S. 814	8
Marshall v. *United States* (C.A.D.C. No. 18047, decided June 30, 1964)	9
Pietch v. *United States*, 110 F. 2d 817, certiorari denied, 310 U.S. 648	9
Pollard v. *United States*, 352 U.S. 354	9
Shepherd v. *United States*, 163 F. 2d 974	9
United States v. *Dege*, 364 U.S. 51	5
United States v. *Hill*, 310 F. 2d 601	8
United States v. *Lustman*, 258 F. 2d 475, certiorari denied, 358 U.S. 880	8
United States v. *Provoo*, 350 U.S. 857, affirming 17 F.R.D. 183	9
Worthington v. *United States*, 1 F. 2d 154, certiorari denied, 266 U.S. 626	8
STATUTES:	
18 U.S.C. 1341 and 1343	2

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 461

KARL HALLER AND MARIA HALLER, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 333 F. 2d 827.

JURISDICTION

The judgment of the court of appeals was entered on July 7, 1964 (Pet. App. B). On August 5, 1964, Mr. Justice Stewart extended the time for the filing of a petition for a writ of certiorari to and including September 5, 1964, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioners have been denied a right to a speedy trial.

2. Whether the evidence was sufficient to support the convictions.

3. Whether there were errors at the trial.

STATEMENT

Petitioners were convicted on November 7, 1963, in the United States District Court for the Southern District of New York on four counts of an indictment charging mail and wire fraud and conspiracy to commit these offenses in violation of 18 U.S.C. 1341 and 1343 (R. I 3). Each was sentenced to imprisonment for one year on each count, the terms to run concurrently (R. I 3-4).[1] The court of appeals affirmed.

1. The scheme charged was that petitioners solicited money from would-be investors by falsely representing that they were were planning to open a candy factory in New York and were then operating such a factory in Los Angeles.

The evidence showed that petitioners placed an advertisement in a New York-issued German-language newspaper representing that they were manufacturers with a name well known in Europe and America who were looking for a silent or active partner willing to invest $5,000 to $10,000 in a factory to be opened in New York. On about August 31, 1958, the advertisement, sent through the mail, reached a German immi-

[1] The appellant's appendix in the court below is designated in this Court as Volume I of the record, and the government's appendix as Volume II. We are lodging a transcript of trial proceedings referred to herein as "Tr." We are also lodging minutes of pretrial proceedings.

grant couple, Walter and Maria Roos, who were employed as cooks in a private school in New Jersey and who had been in this country for a little more than a year (R. II 2a-4a). The Rooses responded by mail to the advertisement and the Hallers visited them at the New Jersey school shortly thereafter (R. II 5a). Karl Haller showed the Rooses an identification card and a seal, said he was the son of the owner of the Haller chocolate factory in Stuttgart, Germany, and that he would like to open a factory in New York (R. II 8a-9a, 6a, 24a-26a). Maria Haller added that for this purpose they already had a factory located on the Hudson River (R. II 6a, 25a). The Hallers said that they were then operating a candy factory in Los Angeles which was run by Mrs. Haller's brother, but that the trans-country shipment of the candy was impractical because of the summer heat and high cost of transportation (R. II 7a, 25a). Karl Haller produced some papers represented as being orders already delivered to customers, which the Rooses could not read as they were written in English (R. II 7a). He gave the Rooses a bag of chocolate candy which he said had been produced at the Los Angeles factory and cautioned them not to speak of the proposed new factory because it was a "business secret" (R. II 7a, 10a).

The Rooses told the Hallers that they had only $4,456 to invest and suggested that it might not be enough. The Hallers said that they would take it (R. II 24a) and that they would need it within two days since they expected to begin operation in three weeks (R. II 10a, 26a). Two days thereafter Maria Haller accompanied Roos to two banks from which he withdrew his family savings of $4,456 (R. II 10a-11a). That evening Roos received a contract from Haller

written in German and turned over the money (R. II 12a-13a). When Roos said he would like an English contract also, Haller promised he would prepare one in 14 days when his secretary came from California. A second contract also written in German provided that Roos must give twelve months' notice before he could withdraw his money (R. II 12a, 14a-15a).

The Rooses thereafter met or talked by telephone with the Hallers upon several occasions in September, October and November 1958 (R. II 13a, 17a, 18a, 19a). The Hallers assured the German couple that everything was all right with the business. Upon one occasion Maria Haller told Roos that she could not show him the factory because the owner who had the key was on vacation (R. II 13a, 26a). Upon another occasion she showed him a letter (which Roos could not read) which she represented as having come to her from lawyers relative to a competitive product made by General Mills (R. II 19a). When Roos expressed concern, she told him he had nothing to worry about since the factory in Los Angeles was still operating (R. II 19a). Karl Haller assured Roos that after some initial advertising they would be ready to start business (R. II 20a). In a last telephone conversation on November 30, he told Roos that everything was all right and that the contract for the factory would be signed in two days (R. II 21a).

The Hallers never opened a factory in New York and the money of the Rooses was never returned (Tr. 44). Karl Haller testified that the money had been given to his wife, that he did not know where she was holding it, and that it had not been used for the business in which the Rooses thought they were investing (Tr. 246, 259-260). The Hallers had in fact op-

erated a factory in Los Angeles for a period of time prior to the Roos transaction in September 1958 (R. II 29a), but it had ceased operation prior to June 1958 when all the candy-making equipment was sold at auction in a mortgage foreclosure (R. II 31a, 32a, 34a; Tr. 186-187).

The Hallers were arrested on December 8, 1958, after they appeared in Linderhurst Long Island, at an attorney's office to confer with respect to renting, with an option to buy, a factory owned and used by one Cavaglieri for manufacturing noodles and sauces. Warrants for their arrests had been issued on November 14, 1958, the date of the indictment (R. I 1; Tr. 143-151). A post office inspector testified that he did not have the warrant with him when he saw petitioners in Long Island. He asked them to come, and they came voluntarily, to the United States Attorney's office in the Southern District where they were arrested (Tr. 157-160).

2. Petitioners were enlarged after apprehension—Mrs. Haller upon her own recognizance and Mr. Haller upon bond of $2,500 (See Minutes 1/30/62, p. 6). On January 13, 1959 (two months after the return of the indictment) petitioners attacked the indictment (R. I 2) on the grounds *inter alia* that a husband and wife could not be co-conspirators. Decision was held in abeyance by the district court because this issue was then pending before this Court. The petitioner's motion was denied on July 12, 1960 (R. I 2) on the authority of *United States* v. *Dege*, 364 U.S. 51, decided June 27, 1960. The case was restored to the calendar by the government on April 25, 1961, and adjourned by consent to May 24, June 26, June 28 and September 18. (R. I 2, 56-58; Minutes 4/25/61, 5/24/61 pp. 1-3). On this latter date, September 18,

1961, Mrs. Haller appeared in court without counsel,[2] and indicated that she would be "pleased" if defense counsel McAloon were permitted to withdraw. The case was adjourned to September 25 to permit the matter to be settled (Minutes 9 18 61). On September 25, Mr. McAloon requested permission to withdraw as counsel because he had not been properly compensated and had been unable to communicate with petitioners. Mrs. Haller, who was late for this court appearance, resisted the requested withdrawal but stated that she had no confidence in Mr. McAloon. Thereupon the court relieved counsel and instructed petitioners to be in court with new counsel on October 2, prepared to fix a date for trial (Minutes 9 25 61, p. 14). Thereafter on several occasions petitioners appeared in court without counsel despite specific instructions of the court that they appear with counsel and adjournments for that purpose (See Minutes 10 2 61; 11 6 61; 11 13 61 a.m. and p.m.; 11 14 61 a.m. and p.m.).

On the first of these occasions the court, after repeated inquiries, drew from Mrs. Haller only the representation that she had a lawyer in Washington. Later she gave the court the name of a well-known Washington lawyer and made representations as to his impending arrival to represent the defense. On November 14, 1961, government counsel apprised the court that he had been in personal touch with the Washington lawyer who had stated that, while Mrs.

[2] Petitioners were originally represented by the law firm of Garey & Garey and, upon its withdrawal in April 1959, by McAloon and Hirschberg. In January 1962, Attorneys Robert Hall and Samuel Siegel appeared for petitioners. At trial they were represented by Attorney George Kambur who first appeared for Mrs. Haller in June 1963 and Mr. Haller on the morning of trial (R. II 8).

Haller had been in touch with him, he had made no commitments as to representation or appearance. Because of these circumstances, and the fact that petitioners had given the court false information as to their addresses, government counsel asked that bail be fixed at $5,000 for each of the petitioners. Petitioners were directed to return to court on November 17 with counsel (Minutes 11/14/61, p. 46).

On November 17, 1961, neither petitioner was represented and government counsel advised that they had been arrested by State police. The case was marked from the calendar (Minutes 11/17/61).

The case was restored to the calendar in January 1962 when Mrs. Haller, on release from State custody, appeared in open court with attorneys Siegel and Hall to ask for reduction of bond. The request was granted, Mrs. Haller was released in the custody of counsel and the case adjourned until January 17 when it was again marked off the calendar because Mr. Haller was still incarcerated on the local charge (R. II 9). On January 30, 1962, the case was restored to the calendar to reduce bail for Mr. Haller (who had then served some 11 weeks in State custody) and once again marked off the calendar (Minutes 1/30/62 pp. 3, 9).

In June 1963 the case was restored to the calendar and the trial date set for September 30. It was then, on June 17, 1963, that petitioners moved to dismiss the indictment for lack of a speedy trial (R. I 2, 30-32). The district court denied the motion in August 1963 (and upon reargument adhered to its decision on September 18, 1963) on the ground that the record showed a waiver of the right to a speedy trial by failure to assert it (R. I 50-51, 55).

The case went to trial on September 30, 1963, after the trial court overruled a motion for adjournment by defense counsel Kambur (See fn. 2, p. 6, *supra*) on the ground that he had had insufficient time to prepare a defense or secure the deposition of a witness (Tr. 3-7).

ARGUMENT

Petitioners never demanded an early trial or voiced any objection to an adjournment,[3] although throughout the period between indictment and trial (except for a four month period attributable to their own dilatory tactics) they were represented by retained counsel. As the court below noted, it is evident that they sought and welcomed the delay on the chance that they might never be brought to trial.

Under these circumstances, this case falls within the settled rule that the failure to demand a speedy trial constitutes a waiver of the right thereto. *United States* v. *Lustman*, 258 F. 2d 475 (C.A. 2), certiorari denied, 358 U.S. 880; *United States* v. *Hill*, 310 F. 2d 601 (C.A. 4); *Harlow* v. *United States*, 301 F. 2d 361 (C.A. 5), certiorari denied, 371 U.S. 814; *Worthington* v. *United States*, 1 F. 2d 154 (C.A. 7), certiorari de-

[3] The statement made by Maria Haller in open court on April 25, 1961 cannot be read as an objection. She said that she and her husband had been under tremendous strain and would like to have "this thing over," that they would like to ask for their "doctor's permission" and have him notify the court, that for the time being they "would like to take the day [that] has been given to us" and that "when the time is set" she would have something shocking to say. Counsel stated there was no objection to adjournment (R. I. 56-57).

The affidavit of counsel for Mrs. Haller filed in support of her motion to dismiss for a lack of a speedy trial (made in June 1963 when the final trial date was set) recites that "no previous application has been made." (R. I. 32).

nied, 266 U.S. 626; *Shepherd* v. *United States*, 163 F. 2d 974 (C.A. 8); *Collins* v. *United States*, 157 F. 2d 409 (C.A. 9); *Pietch* v. *United States*, 110 F. 2d 817 (C.A. 10), certiorari denied, 310 U.S. 648. See, also, *Pollard* v. *United States*, 352 U.S. 354, at 362, fn. 8, and *United States* v. *Provoo*, 350 U.S. 857, affirming 17 F.R.D. 183 (D. Md.).

Petitioners claim a conflict with the decision of the District of Columbia Circuit in *Marshall* v. *United States* (C.A.D.C. No. 18047, decided June 30, 1964), where the court found denial of a speedy trial although there had been no demand for a speedy trial prior to the *first* of three motions to dismiss the indictment. The facts in *Marshall* were, however, very different from the situation here. Marshall was an indigent defendant, charged with a capital offense, who had been incarcerated in jail or in a mental institution for over three years during the period between indictment and a third trial. The court of appeals found that the delay there had been oppressive and that the defendant had been fatally prejudiced, since, during the delay, he became unable to communicate effectively and was thus unable to testify in his own defense. Petitioners here were out on bail, were represented by their own counsel, and can show no prejudice.[4] A considerable part of the delay is attributable to the filing of a motion by petitioners, adjournments to which they consented, postponements granted for the

[4] The suggestion that petitioners were prejudiced by the departure of Cavaglieri from this country is of no merit. The evidence to which he could have testified was before the jury and was not in dispute—*i.e.*, that petitioners had, from some time in November 1958, been in touch with him with respect to a factory which he owned and that they went to a lawyer's office on December 8, 1958 to discuss the rental of these premises.

purpose of permitting them to retain counsel, or their absences due to their own criminal activity. They are thus in no position to complain of lack of a speedy trial.

2. There is no occasion for this Court to review evidence found to be sufficient to support conviction by both courts below. The proof as to the solicitation of investments, the use of the mails and wires, the acceptance of some $4450 from the Rooses was undisputed. The defense was good faith. Both Mr. and Mrs. Roos testified that the Hallers represented *inter alia* not only that they intended to open a factory in New York, but that they were then operating a factory in California. This latter representation (which Haller denied that he made) was admittedly false by Haller's own testimony. From this and the evidence of the overall representations made by petitioners, the lulling techniques used to keep the Rooses from complaining, and the testimony of Haller himself that he did not know what had become of the money of the Rooses, the jury had more than sufficient basis to conclude that the Hallers never intended to use the money for investment purposes but were engaging in a scheme to defaud.

3. The other issues urged by petitioners do not merit the attention of this Court. The charge of an illegal arrest is urged for the first time here. The record shows that at the time petitioners were arrested by postal inspectors (on December 8, 1958) there was an outstanding warrant for their arrest issued on November 14, 1958, the date of indictment (R. I. 1). The claims of error in the admission of evidence and the charge to the jury were properly dismissed by the

court below without discussion as being entirely without substance. The question of the Los Angeles operation was in issue in the case. Since Karl Haller testified on direct examination as to the success of this venture (R. II 34a-35a), as well as to his interest in a New Orleans venture (Tr. 168), cross-examination as to these operations was entirely proper (See Tr. 230, 234). No objection was voiced as to cross-examination relative to a prior conviction for passing a bad check, nor was this improper (Tr. 244-245). As to the contention that the trial court erred in not charging that "the charges could not be predicated by piling an inference upon an inference" (Pet. 3, 7), petitioners requested no such charge, nor did they except to its omission or to any portion of the instructions given. The charge set forth clearly and at length the contentions of the defense and the thrust of that defense as to good faith (R. I 8, 9).

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.

HERBERT J. MILLER, JR.
Assistant Attorney General.

BEATRICE ROSENBERG,
JULIA P. COOPER,
Attorneys.

OCTOBER 1964

U. S. GOVERNMENT PRINTING OFFICE 1964—747 978/P C 330